

**James F. Cotter, Proprietor, d/b/a Petaluma Convalescent Hospital and Hospital and Institutional Workers Union, Local 250, Service Employees International Union, AFL-CIO, Petitioner.**  
Case 20-RC-15485

26 July 1984

**DECISION, ORDER, AND DIRECTION  
OF SECOND ELECTION**

**BY CHAIRMAN DOTSON AND MEMBERS  
ZIMMERMAN AND HUNTER**

Pursuant to a Stipulation for Certification Upon Consent Election, an election by secret ballot was conducted by the Regional Director for Region 20 of the National Labor Relations Board 13 May 1982 among employees in the stipulated unit. At the conclusion of the election, the parties were furnished a tally of ballots which showed that of approximately 64 eligible voters, 16 cast ballots for and 37 cast ballots against the Petitioner. There were no challenged ballots. Thereafter, the Petitioner filed timely objections to conduct affecting the results of the election.

After an investigation, the Regional Director issued his Report on Objections and notice of hearing. In his report, the Regional Director found that the Petitioner's objections disclosed substantial and material issues of fact which could best be resolved by a hearing.

Pursuant to the notice, a hearing was held 15 July 1982 before Hearing Officer Alina M. Lopez-Martin, in which the Employer and the Union participated. The parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues herein. Thereafter, the Employer filed timely exceptions and a supporting brief, and the Union filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

The Board has reviewed the record in light of the exceptions and briefs and hereby adopts the hearing officer's findings and recommendations.<sup>1</sup>

<sup>1</sup> We have considered our colleague's dissenting opinion but are in full agreement with the hearing officer's findings and recommendations which accord with pertinent Board precedent. Our dissenting colleague's concerns have been considered, and rejected, in various of the decisions cited by the hearing officer in her report. The hearing officer found the alleged interrogation nonthreatening and not creative of an atmosphere that rendered a free choice improbable. However, she recommended a new election based on the threat to close the facility. The pertinent portion of the report has been attached to this decision as an appendix. We

**ORDER**

It is hereby ordered that the election conducted herein on 13 May 1982 among the employees of James F. Cotter, Proprietor, d/b/a Petaluma Convalescent Hospital, located at Petaluma, California, is set aside.

[Direction of Second Election omitted from publication.]

**CHAIRMAN DOTSON, dissenting.**

Contrary to my colleagues and the hearing officer, I would find that the statement by Mary Fumigalli, director of staff development, to several employees in the employees' or nurses' lounge concerning her feeling that Cotter, the Employer's proprietor, would close the facility and go bankrupt before he would allow the Union to come in, did not constitute a threat which inhibited the employees in casting their ballots in the election.

The record shows that the employees' lounge was used as a "break" area by both employees and supervisors; that Fumigalli is a minor supervisor whose main function is the 2- or 3-day orientation of new nurses aides and the establishment of an in-service training program for nurses; and that Fumigalli's supervisory authority is limited to recommending to the director of nursing that an employee is not doing a satisfactory job and should be reprimanded. Nurse assistant Sharon Ragland, a union organizer, testified that only three or four other employees in addition to herself were present in the nurses' lounge when Fumigalli made her statement.

Moreover, the record also shows that the employees who heard Fumigalli's statement did not believe that the Employer would close the facility and were aware that such conduct would be unlawful. Employee Ragland testified, "I didn't believe it," when asked at the hearing about her re-

agree that the election should be set aside and that a new election should be directed.

In light of the decision to set aside the election, Member Zimmerman finds it unnecessary to pass on the hearing officer's finding with regard to the alleged interrogation of employees.

We find, contrary to our dissenting colleague, that the record does not support a finding that the statement by Mary Fumigalli, director of staff development, that the Employer would close the facility and go bankrupt before he would allow the Union to come in, 2 days before the election in the employees' lounge, was not widely disseminated because no more than 3 or 4 of the 64 eligible voters heard the statement. Although Sharon Ragland, a union organizer, testified that only three or four other employees in addition to herself were present in the lounge when Fumigalli made her statement, such testimony does not constitute evidence that the statement was not disseminated to other employees. The employees who heard Fumigalli's statement did not testify, and Ragland did not testify that she did not speak to other employees concerning Fumigalli's statement. No conclusion may be drawn from this record that the impact of Fumigalli's statement was limited to the three or four employees in her presence when she made the threat. See *Standard Knitting Mills*, 172 NLRB 1122 (1968).

sponse to Fumigalli's comment that Cotter would shut down and go bankrupt if the Union came in. Ragland testified further that at the time Fumigalli made the comment in issue she stated that Cotter would not give up a \$76,000 income for one union. Ragland also made the statement to Fumigalli that, "He [Cotter] cannot do that, and I am not stupid enough to believe that he would." In response to a question by counsel for the Union as to whether or not the other employees who were in the lounge with Ragland knew whether or not Fumigalli's comment was against the law, Ragland testified: "Most of them were aware of that, yes." When counsel asked Ragland how she knew that, Ragland testified: "Because of my helping organize the union; I was reassuring them they couldn't do that."

I find that, as the record shows, Fumigalli, a minor supervisor, was merely expressing her personal feelings concerning the Employer's response to the Union; that the comment was made in a break area regularly used by both employees and supervisors where myriad topics were discussed; that no more than 3 or 4 of the 64 eligible voters heard the comment; and that the employees were aware of the law and that none felt threatened.

In conclusion, I would find that Fumigalli's comment was not clearly coercive and that it did not have a tendency to restrain the exercise of free choice in the election. Accordingly, I would not set aside the election.

#### APPENDIX

Sharon Ragland testified that on May 11, two days before the election, Director of Staffing Mary Fumigalli spoke with a group of employees in the nurses lounge. Fumigalli stated that she felt that Cotter would "close the facility down before he would allow a union to come in." "He would close it down and go bankrupt before he would allow a union to be . . ." These statements took place after a meeting held by James Cotter, two days before the election. The Employer did not provide any rebuttal testimony.

Eric Mawson, who was the administrator of the facility from March 16 to May 13, testified that Mary Fumigalli was excluded from the *Excelsior* list because she is considered a supervisor and part of management. Fumigalli is a registered nurse who has on occasion acted as a charge nurse and who during the critical period acted primarily as the Director of Staff Development.

As Director of Staff Development, Fumigalli can recommend against certifying new employee trainees and

her recommendations are acted upon. She is in charge of orienting new personnel to the facility. She also provides in-service training to the nursing staff and answers directly to the Director of Nursing, Dorothy Beck.

According to Mawson, all directions given by Fumigalli, or any other registered nurses, are to be followed by the nursing staff. Mawson explained that the Director of Nursing can direct Fumigalli to give in-service training if she believes that nursing care warrants it. Fumigalli sets up the training program and then implements it. Fumigalli then reports the progress of the nurses to the Director of Nursing. Although Fumigalli does not have the authority to reprimand employees, she can effectively recommend that an employee be reprimanded for not performing his or her job, at which time the Director of Nursing counsels the employee.

Mawson testified further that Fumigalli regularly attends management meetings and was instructed as to the do's and don'ts of management during the Union organizing campaign.

The Employer in its brief argues that Fumigalli, a supervisor within the meaning of the Act, was not in a position to know the management position, but was merely speculating without actual knowledge. Furthermore, even if two or three other employees who were present during the exchange were coerced, there is no evidence that they communicated the exchange to other employees, and therefore, the number of employees who might have been influenced could not have been sufficient to affect the outcome of the election.

In determining whether any person is acting as an agent of the Employer, the questions of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. In determining whether an Employer's statement to employees is permissible, the major issue is whether the employees could find any hidden threat or promise in what was said.<sup>1</sup> Fumigalli's prediction that the facility might close, was heard by Sharon Ragland, Sharon Shaw, Farideh Daylami, Gina Fumigalli, and Patty Vivian. Furthermore, the Board has held that statements during election campaigns are expected to be disseminated and discussed among employees.<sup>2</sup>

Accordingly, I recommend that the election held May 13, should be set aside and that a new election should be held.

<sup>1</sup> *Caron International*, 246 NLRB 1120.

<sup>2</sup> *Standard Knitting Mills Inc.*, 172 NLRB 1122 (1968). I disagree with the Employer's argument and conclude that Fumigalli's prediction of the closure of the facility made close to the election date,<sup>3</sup> was sufficiently threatening to inhibit the free choice of the employees in casting their ballot for or against Petitioner.

<sup>3</sup> *Dresser Industries*, 231 NLRB 501, and *Stouffer Restaurant and Inn Corporation*, 213 NLRB 799, 800.